

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

IN THE MATTER OF:

1. Respondent Corporate Resources is a permanent employment placement

service that tries to place candidates in full-time positions. Respondent CR Temporaries is a short-term employment placement agency that tries to place candidates in short term assignments.

2. Ingrid Moore is the president of both Respondents.

3. On March 31, 1998, Complainant, Steven Fong, sought placement services from both Respondents. At Respondents' request, he prepared written employment applications. He also took various basic skills tests, including a typing test.

4. On or about August 11, 1998, Complainant filed a charge of discrimination with the IDHR against Respondent CR Temporaries. In that charge, Complainant alleged that CR Temporaries discriminated against him because of his emphysema.

5. On December 27, 1999, the IDHR dismissed Complainant's August, 1998 charge for lack of substantial evidence.

6. In September of 1998, one of the Respondents placed Complainant with Mountain States Imaging. Complainant was hired by Mountain States and worked there until he was discharged due to a lack of work in spring of 2000. Complainant's job with Mountain States involved preparing and scanning documents.

7. In June of 2000, Complainant contacted Respondents and requested job assignments from them.

8. On June 27, 2000, Complainant and Ingrid Moore had a telephone conversation in which Complainant inquired about job placements. During that conversation, Complainant and Moore discussed Complainant's prior discrimination charge as well as a discrimination charge filed by Complainant against a client of one of Respondents.

9. Complainant inquired about job placements on June 27, 2000, June 28, 2000, July 10, 2000, July 18, 2000, and August 9, 2000.

10. Respondents have not placed Complainant since June of 2000.

11. Since June of 2000, Respondents have placed numerous individuals in jobs.
12. After June 27, 2000, Complainant did not supplement his application with Respondents. Respondents did not ask for such supplementation after that date.
13. Beginning in September of 1998 and continuing through the date he filed this action, Complainant repeatedly wrote to Respondents asking for information about their clients. Complainant's letters made it clear that he wanted information on Respondents' clients so he could pursue potential discrimination litigation against those clients.
14. Complainant filed his charge of retaliation on August 15, 2000.
15. In 2002, Complainant filed a lawsuit against Moore and Respondents in the Circuit Court of Cook County. That suit alleged that Moore and Respondents discriminated against Complainant on the basis of a physical handicap. The suit also alleged that Moore and Respondents prohibited Complainant from discovering potential violations of discrimination laws by Respondents' clients. That suit was dismissed for want of prosecution on or about November 7, 2002. Complainant's subsequent motion to vacate that dismissal was apparently unsuccessful.
16. On August 31, 1998, Respondents received notice of Complainant's August charge of discrimination.
17. On September 2, 1998, Complainant wrote a letter to Moore. In that letter, Complainant stated that Moore was "not the target of [his charge]" and he suggested that he would be willing to drop the matter if Moore's staff provided "cooperation" with his investigation.
18. Throughout the relevant time period, Christa Huey worked as a staffing advisor and personnel consultant for Corporate Resources. In that position, she had some telephone conversations with Complainant.
19. On September 28, 1998, one of Respondents placed Complainant with Mountain States Imaging.

20. On October 2, 1998, Complainant wrote a letter to Huey. In that letter, Complainant stated that he would agree "to drop charges ... in exchange for providing myself with facts towards a third company, violating the law." In that same letter, Complainant asked for information on conversations Huey had with her clients. He also included the following language:

I appreciate what you and your organization have done and are doing, but I want you to understand, prior to my registering with your agency, I've been repeatedly denied employment, although, I claim, I'm clearly qualified for the positions I seek. Your help, although accepted gratefully, does not erase the many years of unemployment due to the acts of a few, the reason for continued investigation.

21. On October 11, 1998, Complainant wrote another letter to Huey. In that letter, he again stated that he wanted information on conversations with Respondents' clients.

22. On November 6, 1998, Complainant sent a proposed contract to Moore. Under the terms of that proposal, Moore would provide Complainant with detailed information on conversations between Respondents' employees and Respondents' clients and Complainant would release any claims arising out of the subject matter of his charge of discrimination.

23. Complainant had several telephone conversations with Moore and Huey in which he requested information on conversations between Respondents and their clients.

24. Complainant did not contact Respondents between March of 1999 and June of 2000.

25. Respondents routinely clear applicants' names off their roster after a period of inactivity. By June of 2000, Complainant had been removed from Respondents' roster.

26. Other than Complainant, none of Respondents' applicants have brought suit against Respondents.

27. Moore never told Complainant that she would not place him because he had sued her.

28. Respondents' failure to place Complainant was not due to his filing of a charge.

CONCLUSIONS OF LAW

1. Complainant is an "aggrieved party" as defined by section 1-103(B) of the Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.* (hereinafter "the Act").
2. Each Respondent is a "person" as defined by section 1-103 (L) of the Act and is subject to the provisions of the Act.
3. Complainant failed to establish a *prima facie* case of retaliation against him.
4. Respondents articulated a legitimate, non-discriminatory reason for their actions.
5. Complainant failed to prove by a preponderance of the evidence that Respondents' articulated reason was a pretext for unlawful retaliation.

DISCUSSION

Respondent Corporate Resources is a permanent employment placement service that tries to place candidates in full-time positions. Respondent CR Temporaries is a short-term employment placement agency that tries to place candidates in short term assignments.

On March 31, 1998, Complainant, Steven Fong, sought placement services from both Respondents. At Respondents' request, he prepared written employment applications. He also took various basic skills tests, including a typing test.

On or about August 11, 1998, Complainant filed a charge of discrimination with the IDHR against Respondent CR Temporaries. In that charge, Complainant alleged that CR Temporaries discriminated against him because of his emphysema. On December 27, 1999, the IDHR dismissed that charge for lack of substantial evidence. Nonetheless, on August 15, 2000, Complainant filed his charge of retaliation against Respondents. That charge alleged that Respondents refused to place him because of the charge he filed against them in August of 1998.

The method of proving a charge is well established. First, Complainant must establish a *prima facie* case. If he does so, Respondents must articulate a legitimate, non-discriminatory

reason for their actions. For Complainant to prevail, he then must prove that Respondents' articulated reason is pretextual. **Zaderaka v. Human Rights Commission**, 131 Ill. 2d 172, 545 N.E.2d 684 (1989). See also **Texas Dep't of Community Affairs v. Burdine**, 450 U.S. 251 (1981).

To establish his *prima facie* case of retaliation, Complainant needs to prove three elements. He needs to show 1) that he engaged in a protected activity, 2) that Respondents took action against him, and 3) that there was a causal nexus between the protected activity and Respondents' adverse action. **Carter Coal Co. v. Human Rights Commission**, 261 Ill. App. 3d 1, 633 N.E.2d 202 (5th Dist. 1994).

The first element is not in doubt. When Complainant filed his charge of discrimination in August of 1998, he engaged in a protected activity. Unfortunately for Complainant, though, he failed to establish either of the other two elements of a *prima facie* case.

Complainant argues that Respondents denied him placement services and that that denial was an adverse action. The record, though, undercuts that argument. Complainant filed his initial charge of discrimination against Respondent CR Temporaries on August 11, 1998. A few weeks later, on August 31, 1998, Respondents received notice of that charge. (Complainant did not file any charge at that time against the other Respondent, Corporate Resources of Illinois. However, since the two corporate Respondents have the same president, Ingrid Moore, it is presumed that both Respondents were aware of Complainant's actions and would both have the same potential motive to retaliate.)

Appellate Court and Commission decisions have repeatedly taken the position that the causal nexus in a retaliation case can be demonstrated by proving that there was a very short time period between the complainant's protected act and the respondent's adverse action. See, e.g., **May v. Human Rights Commission**, 224 Ill. App. 3d 353, 586 N.E.2d 550 (1st Dist. 1991); **Ellis and Brunswick Corp.**, IHRC, ALS No. 1394, March 30, 1987. Following that logic,

one would assume that, if Respondents were to retaliate against Complainant, they would do so soon after he filed his charge of discrimination.

In fact, though, there was no quick action taken against Complainant. Instead, less than a month later, on September 28, 1998, one of Respondents placed Complainant with Mountain States Imaging. Complainant was hired for that position. He worked for Mountain States until he was discharged from that job in spring or summer of 2000. It is worth noting that his discharge was due to lack of work for Mountain States, not any interference from Respondents.

In other words, once Respondents became aware of Complainant's charge of discrimination, they responded by finding him a job. That does not sound much like retaliation. It certainly does not qualify as an adverse action. Moreover, the timing seriously undercuts any attempt to establish a causal nexus.

Recognizing that flaw in his case, Complainant stresses the fact that Respondents never placed him after the end of his position with Mountain States. The circumstances surrounding that failure, though, do not support Complainant's arguments.

For one thing, there was a delay of over a year and a half (in fact, nearly two years) between the time Complainant filed his initial charge and the time Respondents allegedly failed to find him a job. As suggested above, that fact undercuts Complainant's theory of the case.

For another thing, throughout his relationship with Respondents, and certainly during the time period after he left Mountain States, Complainant seemed far more interested in obtaining information on Respondents' clients than on obtaining Respondents' help in his job search. Beginning in September of 1998 and continuing through the date he filed this action, Complainant repeatedly wrote to Respondents asking for information about their clients. Complainant's letters made it clear that he wanted information on Respondents' clients so he could pursue potential discrimination litigation against those clients.

On September 2, 1998, before his Mountain States placement, Complainant wrote a

letter to Moore. In that letter, Complainant stated that Moore was "not the target of [his charge]" and he suggested that he would be willing to drop the matter if Moore's staff provided "cooperation" with his investigation.

On October 2, 1998, after the Mountain States placement, Complainant wrote a letter to Christa Huey. Throughout the relevant time period, Huey worked as a staffing advisor and personnel consultant for Corporate Resources. In that letter, Complainant stated that he would agree "to drop charges ... in exchange for providing myself with facts towards a third company, violating the law." In that same letter, Complainant asked for information on conversations Huey had with her clients. He also included the following language:

I appreciate what you and your organization have done and are doing, but I want you to understand, prior to my registering with your agency, I've been repeatedly denied employment, although, I claim, I'm clearly qualified for the positions I seek. Your help, although accepted gratefully, does not erase the many years of unemployment due to the acts of a few, the reason for continued investigation.

On October 11, 1998, Complainant wrote another letter to Huey. In that letter, he again stated that he wanted information on conversations with Respondents' clients.

On November 6, 1998, Complainant sent a proposed contract to Moore. Under the terms of that proposal, Moore would provide Complainant with detailed information on conversations between Respondents' employees and Respondents' clients and Complainant would release any claims arising out of the subject matter of his charge of discrimination.

In addition, Complainant had several telephone conversations with Moore and Huey in which he requested information on conversations between Respondents and their clients. Clearly, that was an issue of great concern for Complainant.

At one point, Complainant seemed to lose interest in Respondent's clients. Complainant did not contact Respondents between March of 1999 and June of 2000.

In June of 2000, Complainant again contacted Respondents. By that time, because of the length of time since his last consistent contact with Respondents, Complainant's name had

been removed from the companies' active rosters. Thus, under Respondents' usual business practice, Complainant essentially had to start over and provide Respondents with the sort of information usually collected from new applicants. That process was never completed.

Clearly, failure to complete the application process was not, by itself, a reason not to place Complainant. After all, when Complainant was placed in 1998, there were gaps in his application. However, in the summer of 2000, Complainant was not just asking for a job. He was renewing his request for information on Respondents' clients.

On June 27, 2000, Complainant and Ingrid Moore had a telephone conversation in which Complainant inquired about job placements. During that conversation, Complainant and Moore discussed Complainant's prior discrimination charge as well as a discrimination charge filed by Complainant against a client of one of Respondents.

The fact that the earlier charge was discussed is critical to Complainant's case. In his eyes, it proves that the suit was still on Moore's mind. In fact, Complainant testified that Moore specifically told him on June 27 that she would not place him because he had sued her. That testimony, if believed, would be the proverbial "smoking gun" that would prove Complainant's case. Moore, however, denied making that statement and her testimony on that point was far more believable than Complainant's.

Complainant's version of the conversation in question was simple. According to him, the call was quite short, no more than five to eight minutes. He said he called Moore, identified himself, and was told that he would not be hired because of the charge filed with the IDHR. Moore then hung up the phone. He claimed that he then tried again to contact Respondents at the Schaumburg office. He claimed that he was transferred to Moore. Moore then told him again that she would not hire him and she again made reference to his having sued her.

Moore testified to a much different sequence of events. She agreed that Complainant called her. However, she stated that the conversation was not a short one. She testified that

the call probably lasted less than an hour, but she guessed that it ran about forty-five minutes. She testified that he never asked her about job openings or even about his current employment status. Instead, according to Moore, they discussed her companies' client lists. She conceded that she asked why he had sued her, but she denied saying that she would never hire him again. Moore also said that Complainant again raised the issue of litigation and talked about getting search warrants if she wouldn't give him her client lists. Finally, she told him that she couldn't have that same conversation over and over again. She finally asked him not to call her anymore to discuss that particular subject. Moore did not say that there was a second conversation with Complainant.

Moore's version of events was far more credible. Over a period of many months, Complainant had written several letters and made a number of calls in which he requested Respondents' client lists. He acknowledged at the public hearing that he believed that Moore's clients were discriminating against him and he wanted her cooperation to investigate those clients. Even after he became employed by Mountain States, he contacted Respondents in attempts to obtain those client lists. Apparently, actually being employed was not enough to dampen his enthusiasm for the lists. It is inconceivable that he did not raise the issue when he spoke to Moore on June 27.

Perhaps more important is that Complainant's testimony about Moore's alleged statement is entirely inconsistent with Moore's actual behavior. Despite all the conflicting testimony, everyone agrees that Respondents helped Complainant get his job with Mountain States. Moreover, that help came *after* Complainant filed his discrimination charge against Respondents. It makes no sense whatsoever that Respondents would help Complainant immediately after he filed his charge yet deny him similar help nearly two years later *because of that charge*.

In short, the linchpin of Complainant's argument is unbelievable. Moore did not make

the statement he claims she made. As a result, it is clear that Complainant did not establish a *prima facie* case of retaliation.

It should be noted that, in his reply brief, Complainant claims that the summer of 2000 was Respondents' first opportunity to retaliate after his initial charge was dismissed. He tries to establish a causal nexus from the shorter time period between the *dismissal* of the charge and the failure to place him. That argument is completely without merit. After all, the dismissal of the charge was an action by the IDHR, not a protected act by Complainant. What he had to prove in this litigation was a causal nexus between his own protected act (the filing of the initial charge) and an adverse action by Respondents. He failed to establish that nexus.

The lack of a *prima facie* case is not, by itself, fatal to Complainant's case. During the public hearing, Respondents articulated a legitimate, non-discriminatory reason for their actions. Once such a reason is articulated, there is no need for a *prima facie* case. Instead, at that point, the decisive issue in the case becomes whether the articulated reason is pretextual. ***Clyde and Caterpillar, Inc.***, IHRC, ALS No. 2794, November 13, 1989, *aff'd sub nom Clyde v. Human Rights Commission*, 206 Ill. App. 3d 283, 564 N.E.2d 265 (4th Dist. 1990).

Moore testified that Complainant was not placed because he failed to call in available for work. That explanation is not supported by the record. The parties stipulated in their prehearing memorandum that Complainant inquired about job placements on June 27, 2000, June 28, 2000, July 10, 2000, July 18, 2000, and August 9, 2000. It is difficult to reconcile that stipulation with Moore's explanation. The simple answer has to be that the explanation is false.

Nonetheless, for Complainant to prevail, it is not enough simply to prove that the articulated reason is false. Instead, he must prove that it is a pretext *for unlawful discrimination*. See ***Kotte and Dycast, Inc.***, IHRC, ALS No. 4943, November 22, 1994, citing ***St. Mary's Honor Center v. Hicks***, 509 U.S. 502, 113 S.Ct. 2742 (1993). He failed to meet that burden.

Complainant basically relies upon two pieces of evidentiary support for his pretext

arguments. One, his claim that Moore made a "smoking gun" admission, should be disregarded based upon the arguments discussed earlier. The other claimed evidentiary support comes from the large body of submitted documents.

The documents in question fill two loose-leaf binders and are mostly drawn from Respondents' files. They are applications, placement records, and pay records given to Respondents by their clients, and job seekers like Complainant. They support the parties' stipulations that Respondents placed other job seekers during the time period after Complainant filed his initial charge. The parties stipulated that none of Respondents' other job seekers had brought discrimination charges against the companies.

Unfortunately for Complainant, the exhibits he submitted are not enough, by themselves, to prove his case. There was no testimony supplied to tie those exhibits to Complainant's theory of the case. In fact, other than the exhibits and the above-mentioned stipulations, applicants other than Complainant were virtually ignored at the hearing. The hearing thoroughly addressed Complainant's personal contacts with Respondents. There was voluminous testimony about his telephone conversations and the motivations behind his letters. No such testimony was offered with regard to any other applicant. As a result, it is difficult to conclude that those applicants were necessarily "similarly situated" to Complainant. Certainly, there is no evidence that any of those applicants ever requested (let alone *repeatedly* requested) information to allow them to sue Respondents' clients.

Those repeated requests, made through telephone calls and letters and made to Moore and to her staff, are unquestionably the key to this case. Complainant admitted to Moore, both orally and in writing, that he did not believe that she or her businesses had discriminated against him when he filed his original charge. Instead, that charge was merely an attempt to apply some leverage to force Respondents to turn over client information.

That fact, of course, would not allow Respondents to retaliate against Complainant. It is

unimportant whether his initial charge was made in good faith. The Act prevents retaliation for filing a charge, regardless of the merits of that charge. See ***Dana Tank Container, Inc. v. Illinois Human Rights Commission***, 292 Ill. App. 3d 1022, 687 N.E.2d 102 (1st Dist. 1997).

Nonetheless, the Act does not protect Complainant's repeated requests for client information. Even Complainant has not argued that those requests were protected activities. He may have believed that he was the victim of hiring discrimination during his life, but he had no good faith reason to believe that such discrimination had come from Respondents' clients. He did not even know who Respondents' clients were. He was on nothing more than a prolonged and relentless fishing expedition. That expedition is the most likely reason for any possible lack of enthusiasm in dealing with Complainant.

Ultimately, though, there is no need to determine Respondents' actual reason. It is enough to determine that Respondents did not fail to place Complainant because he filed a charge of discrimination. That determination dooms Complainant's case.

RECOMMENDATION

Based upon the foregoing, Complainant failed to establish a *prima facie* case of unlawful retaliation against him by Respondents. Furthermore, he failed to establish that Respondents' articulated reason for their actions was a pretext for unlawful retaliation. Accordingly, it is recommended that the complaint in this matter and the underlying charge be dismissed in their entirety, with prejudice.

HUMAN RIGHTS COMMISSION

BY: _____
MICHAEL J. EVANS
CHIEF ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: May 4, 2010